IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,	)	NO. 61228-0-I
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
CHARLENE FRIESEN,	)	
	)	
Appellant.	)	FILED: June 15, 2009

BECKER, J. -- Appellant Charlene Friesen was convicted of third degree assault for hitting Amanda O'Neil in the head with a metal cane. When O'Neil was testifying, she said one of the investigating officers told her that Friesen had "done this in the past." Friesen claims defense counsel was ineffective because he failed to raise a hearsay objection to this statement. Given the undisputed evidence of O'Neil's injury and the lack of any plausible explanation for it other than the use of unjustified force by Friesen, it is improbable that the objectionable remark made a difference in the outcome of the case. We affirm.

One afternoon in March 2007, Friesen was crossing the street at an intersection on Lake City Way in Seattle. Friesen, a woman in her mid-fifties, was walking with a metal cane. She noticed that a car had stopped for the light with its front bumper protruding some distance into the crosswalk. Friesen banged on the front of the car with her cane as she walked by.

The driver of the car was Mason Twoponies and the passenger was his fiancée, Amanda O'Neil. O'Neil immediately jumped out and followed Friesen, shouting at her and using profanity. According to O'Neil, Friesen turned around and hit her in the back of the head with her cane. According to Friesen, this did not happen. It is undisputed that both of them crossed to the other side of the street where they got into a physical tussle that ended with both women on the ground, struggling over the cane. It is also undisputed that at some point, Friesen's cane came into contact with O'Neil's head and caused it to bleed.

Friesen was charged with third degree assault. At trial, Twoponies testified that when O'Neil caught up to Friesen, Friesen swung the cane and hit O' Neil on the head. A police officer who was dispatched to the scene said he talked to both women and Friesen did not have any injuries, but O'Neil had a small cut on the back of her head with a lump forming underneath it and enough blood to stain her hair and her scalp. He took a picture of the cut on O'Neil's head and this photo was shown to the jury. Another witness was a medical student who had just gotten off the bus when he saw the two women on the

ground struggling over the cane. He testified that Friesen had O'Neil pinned down.

O'Neil testified that when she jumped out of the car and verbally confronted Friesen, Friesen turned around and swung the cane. O'Neil said the cane hit her on the head and the blow knocked her to her knees. She got up and followed Friesen across the street to stop her from leaving. According to O'Neil, Friesen turned around as if to hit her again and dropped the cane. O'Neil picked it up but Friesen grabbed it back and forced O'Neil to the ground, pressing the cane against her throat. O'Neil said the blow to her head caused her to feel light headed, there was a lot of blood, and the pain lasted for a couple of weeks.

The State concluded direct examination of O'Neil by asking her about the police response to the incident. O'Neil replied that an officer told her that Friesen had "done this in the past":

> Q: Did any other agency arrive?
> A: The police.
> Q: And did they conduct an investigation, as far as you know?
> A: Well, they put her in handcuffs and then they put her in the back of the car. And another one rode up and he took my statement and told me, yeah, she has done this in the past.
> [State]: No further questions.

Defense counsel did not object to the hearsay statement. He immediately began his cross-examination of O'Neil by eliciting her admission that she was "really angry" when she got out of the car to follow Friesen. Counsel went over

O'Neil's version of the encounter but asked no follow-up questions about what the police told her.

The defense case presented testimony by a store owner who said Twoponies' car almost hit Friesen in the crosswalk. He observed Friesen yelling and banging her cane on the car, and believed it was in reaction to almost being hit.

The defense then called Friesen as the last witness. Friesen admitted being annoyed that the car was illegally blocking the crosswalk. She said, "I've almost been killed in crosswalks myself several times." She denied swinging the cane at O'Neil. She said O'Neil tried to push her down. She admitted that she and O'Neil got into a fight during which both of them were grabbing for the cane. "And so we tussled and we—at one point, when I twisted the cane enough … something happened to where she ended up falling down and the cane ended up hitting her in the back of the head." She said that as she was heading for the bus a few moments later, suddenly she found herself "on all fours again and she was sitting on top of me." She said she got on top of O'Neil and said she wasn't going to get off until someone called the police.

The jury was instructed on the elements of third degree assault:

> To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 19th of March, 2007, the defendant caused bodily harm to Amanda O'Neil;
>
> (2) That the physical injury was caused by a weapon or other instrument or thing likely to produce bodily harm;

(3) That the defendant acted with criminal negligence; and
(4) That the acts occurred in the State of Washington.

Jury Instruction 10.

The jury instructions included the definition of criminal negligence:

> A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.
>
> Criminal negligence is also established if a person acts intentionally.

Jury Instruction 8.

The jury was also instructed as to self-defense:

> It is a defense to a charge of Assault that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that she is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

Jury Instruction 12, in part.

The jury found Friesen guilty as charged. The court sentenced her to five days in jail with credit for five days served. Friesen appeals, alleging that counsel was ineffective in failing to object when O'Neil testified that an officer told her, "yeah, she has done this in the past." The State concedes that the

statement was inadmissible hearsay and that an objection, if made, would have been sustained.

In order to establish that counsel was ineffective, a defendant must show that counsel's conduct was deficient and that the deficient performance resulted in prejudice. State v. Brockob, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

The State contends counsel's failure to object was not deficient performance because it was likely a strategic choice to avoid calling further attention to the remark. This appears to be circular reasoning, under which a failure to raise a proper objection to prejudicial testimony could always be justified as tactical. The statement attributed to the police officer may well have caused the jury to infer that O'Neil had a police record for assault. Not only would such information be inadmissible, but so far as the record indicates, it is not true. The defendant's presentence report indicates that the responding officers "have expressed frustration with Ms. Friesen because she does things like call 911 over parking problems in this neighborhood." If the officer did make the remark, perhaps this is the past conduct he was referring to.

Nevertheless, we need not decide whether Friesen has established the

first prong of the test for ineffective assistance because we conclude O'Neil has failed to establish the prejudice prong. The defense strategy was to portray the encounter as a road rage incident provoked by O'Neil. But O'Neil was unarmed and Friesen's testimony about the incident does not explain why a violent reaction was reasonable. Friesen denied swinging the cane and said that O'Neil's head injury was the result of accidental contact with the cane. But it is simply implausible that the cane could have caused the well-documented injury unless Friesen, acting at least negligently under the circumstances, swung it at O'Neil with considerable force.

We conclude it is unlikely that the outcome of the proceeding would have been different had the court excluded the hearsay statement from the jury's consideration.

Affirmed.

Becker, J.

WE CONCUR:

Ajid, J.

Grosse, J.